

Order pursuant to the Debtors' First Notice filed with the Court on or about December 17, 2004. As set forth herein, as a result of (i) the Debtors' sale of substantially all of its assets to Comtel Telecom Assets, L.P. and (ii) entry into a proposed Stipulation with the SBC Telcos (described herein), the provisions of the Carrier Consent Order are no longer sufficient to adequately protect Unipoint. Accordingly, Unipoint seeks additional adequate protection from that provided in the Carrier Consent Order.

5. Since before the Petition Date, the Debtor and Unipoint have been defendants in litigation commenced by certain SBC Telcos as plaintiffs pending in the federal district court for the Eastern District of Missouri, Case No. 4:04CV1303CEJ (E.D. Mo.) (the "Missouri Litigation"). In the Missouri Litigation, the SBC Telcos have sued to recover certain access charges they claim are owed by the Debtors and Unipoint. In addition, prior to the Petition Date, the Debtors commenced an FCC action relating to the SBC Telcos styled *Petition for Declaratory Ruling that VarTec Telecom, Inc. is not Required to Pay Access Charges* (August 20, 2004) (the "FCC Action"). The FCC Action constituted an important protection to Unipoint because it (1) assured Unipoint that Vartec was taking appropriate and timely action to have the FCC determine the issue and (2) assured Unipoint that Vartec was taking appropriate and timely action to bear its part of the expense and effort to determine the issue.

6. On June 17, 2005, the Debtors filed their Motion for Authority to Sell Assets Free and Clear of All Liens, Claims, Rights, Interests and Encumbrances and for Related Relief. On July 29, 2005, this Court entered its Order (A) Approving this Sale Free and Clear of All Liens, Claims, Rights, Interests and Encumbrances to Comtel Investments LLC and (B) Granting Related Relief (Substantially All of the Debtors' Remaining Assets) (the "Sale Motion"), seeking approval

for the sale of substantially all of their assets to Leucadia National Corporation, the stalking horse bidder, or a higher bidder.

7. At an auction held on July 25, 2005, Comtel Investments, LLC ("Comtel") was the winning bidder. On July 27, 2005, this Court considered the Sale Motion. On July 29, 2005, this Court entered its Order (A) Approving this Sale Free and Clear of All Liens, Claims, Rights, Interests and Encumbrances to Comtel Investments LLC and (B) Granting Related Relief (Substantially All of the Debtors' Remaining Assets). Therein, the Court approved the sale of substantially all of the Debtors' remaining assets to Comtel. Comtel Telecom Assets, L.P. ("Comtel Telecom") is the assignee of Comtel. Comtel Telecom has entered into an Asset Purchase Agreement (the "APA") with the Debtors.

8. Pursuant to a proposed stipulation (the "Stipulation") between the Debtors, the SBC Telcos, Comtel Telecom and Rural Telephone Finance Cooperative ("RTFC"), the secured creditor, on the final closing date of the APA, mutual releases between and among the SBC Telcos and the Debtors shall become effective and, *inter alia*, the Debtors shall be dismissed with prejudice from the Missouri Litigation, leaving Unipoint as the sole solvent defendant therein. In addition, pursuant to the Stipulation, the FCC Action shall be withdrawn and the Debtors and Comtel have agreed that neither the Debtors nor Comtel Telecom shall re-assert the FCC Action.

9. The APA contemplates that Comtel Telecom shall provide management services to the Debtors for the supervision and management of the Debtors' businesses through the Final Closing Date. To date, Unipoint has not heard directly from Comtel Telecom with respect to its anticipated use of Unipoint's enhanced technology platform and the potential impact that such use may or will have on the Missouri Litigation. Moreover, the Debtors' and Comtel's agreement with SBC to dismiss the FCC Action and to not re-assert it has the effect of eliminating the Debtors'

defense to the Missouri litigation. Once the Debtors agree to delay or forego the FCC Action, it places additional delay and risk on Unipoint that the FCC will not finally pronounce the obvious the ultimate issue of whether local access charges are due for traffic transmitted across an ESP so that SBC will be precluded from using the AT&T decision as an anti-competitive wedge.

10. The primary beneficiary of the Sale Motion is, of course, RTFC. As of the Petition Date, the total alleged outstanding obligations to RTFC consisted of (i) a term loan of approximately \$154,000,000.00 and (ii) a revolving line of credit with a total commitment of \$70,000,000.00. Comtel's winning bid of \$82,100,000.00 obviously does not provide for payment in full of RTFC's alleged secured claims. Moreover, the various budgets negotiated by the Debtors and approved by the Bankruptcy Court relating to use of cash collateral and the obtaining of post-petition financing do not include amounts to indemnify and/or otherwise provide protection to Unipoint. Given the sale of substantially all assets, it may reasonably be anticipated that the Debtors' estates shall be administratively insolvent and that no administrative expense not specifically budgeted or carved-out will be payable. Thus, RTFC and Comtel shall benefit from the Debtors' use of Unipoint's enhanced services platform, leaving Unipoint to bear the risks of such continued use.

### **III. ARGUMENT AND AUTHORITIES**

#### **A. Request for Additional Adequate Protection**

11. Pursuant to 11 U.S.C. §§ 105, 361, 363 and 365, Unipoint requests that the Court provide additional adequate protection with respect claims and charges related to the Debtors' use of Unipoint's enhanced technology platform as provided under the MSA. *Cf. In re Tudor Motor Lodge Assocs, L.P.*, 102 B.R. 936, 953-54 (Bankr. D. N.J. 1989) (recognizing the elasticity of adequate protection, "susceptible to differing applications over a wide range of factual situations,"

including non-debtor parties to executory contracts). As noted above, the Court has approved the APA which allows the Debtors to delay assumption or rejection of executory contracts pending the Final Closing. During that time period, Comtel Telecom shall manage and operate the Debtors assets. Pursuant to the proposed Stipulation, the Debtors are to be dismissed with prejudice from the Missouri Litigation. However, the claims asserted against Unipoint by the SBC Telcos in the Missouri Litigation are not resolved via the Stipulation, including claims which arise and relate to the Debtors' use of Unipoint's enhanced technology platform. Accordingly, although certain of the claims asserted in the Missouri Litigation against Unipoint are directly related to the Debtors' use of Unipoint's enhanced technology platform, Unipoint should not have to bear the risks and burdens of such use without the Debtors escrowing funds in an amount to be determined by the Court after notice and hearing, on a monthly basis, for indemnification of Unipoint as required under the MSA. Prior to the Debtors' entry into the APA, Unipoint provided certain services relating to Unipoint's enhanced technology platform. Based upon Comtel Telecom's management services under the APA, Unipoint will have little input or knowledge regarding the Debtors' traffic.

12. To provide Unipoint with adequate protection during the period of time prior to assumption or rejection of the MSA, the Debtors should be required to escrow funds, on a monthly basis in an amount to be determined by the Court after notice and hearing, to indemnify Unipoint for any and all claims, damages, charges and/or fees which Unipoint may incur as a result of the Debtors' use of Unipoint's enhanced technology platform and any litigation brought or continued by the SBC Telcos and/or any other person or entity resulting from that use until the MSA is either assumed or rejected. Such escrowed funds should be in an amount sufficient to provide indemnification of, but not be limited to, any damages or charges imposed in the Missouri Litigation and attorneys' fees going forward.

13. The MSA expressly provide for such indemnification and termination. Section 8.3 provides, in relevant part:

[Debtor] shall indemnify and hold harmless [Unipoint] and any third party or affiliated provider, operator or maintenance/repair contractor of facilities employed in connection with the provision of Services or Ancillary Service (all of which shall be referred to as "Providers") against and from any court, administrative or agency action, suit or similar proceeding, whether civil or criminal, private or public, brought against Providers arising out of or related to the contents transmitted hereunder (over [Unipoint]'s network or otherwise) including, but not limited to claims, actual or alleged, relating to any violation of copyright law, export control laws, failure to procure Consents, failure to meet governmental or other technical broadcast standards, or that such transmission contents are libelous, slanderous, and invasion of privacy, or otherwise unauthorized or illegal. [Unipoint] may terminate or restrict any transmissions over the network if, in its reasonable judgment, (a) such actions are reasonably appropriate to avoid violation of applicable law; or (b) there is a reasonable risk that criminal, civil, or administrative proceedings or investigations based upon the transmissions contents shall be instituted against Providers. [Debtors] agrees not to use Services or Ancillary Service for any unlawful purpose, including without limitation any use, which constitutes or may constitute a violation of any local, state or federal obscenity law.

MSA § 8.3 (emphasis added). Section 8.4 of the MSA provides additional grounds for such indemnity. It states:

Each party shall indemnify, defend and hold harmless the other party, its members, shareholders, affiliates, directors, officers, employees, agents, successors, and assigns (collectively, "Assigns"), from any loss, debt, liability, damage, obligation, claim, demand, judgment or settlement of any kind, including, without limitation, reasonable attorneys' fees and other disbursements (collectively, "Damages"), arising out of or sustained in any claim, suit, proceeding or action commenced by any third party based upon the indemnifying Party's, or its Assigns', gross negligence or willful misconduct in connection with the performance of its obligations and duties under this Agreement. The indemnified Party shall promptly notify the other Party in writing of any such claim, suit, proceeding or action. This Section 8.4 shall survive termination of this Agreement.

MSA § 8.4.

14. Based upon the foregoing, Unipoint requests, as adequate protection, that the Debtors be required to escrow funds in an amount sufficient to provide payment of Unipoint's indemnity claims which, in addition, should be granted an administrative priority under 11 U.S.C. § 503(b) and included in any operating budget under the .

15. "A debtor-in-possession which elects to receive benefits from the other party to an executory contract pending a decision to reject or assume the contract' must, nevertheless, pay for the reasonable value of those services." *In re Travelot Co.*, 286 B.R. 462, 466 (Bankr. S.D. Ga. 2002) (quoting *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 79 L. Ed. 2d 482, 104 S. Ct. 1188, (1984). That value, "depending on the circumstances of a particular contract, may be what is specified in the contract." *Bildisco*, 465 U.S. at 531, 104 S. Ct. at 1199; see also *Goldin v. Putnam Lovell, Inc. (In re Monarch Capital Corp.)*, 163 B.R. 899, 907-908 (Bankr. D. Mass. 1994) (non-debtor party to pre-petition contract was entitled to reasonable value of services actually conferred on debtor during post-petition, pre-assumption/rejection period).

16. Likewise, in the case of *In re StarNet, Inc.*, 355 F.3d 634 (7th Cir. 2004), the 7th Circuit recently stated

[n]either § 365(a) nor anything else in bankruptcy law entitles debtors to more or different services, at lower prices, than their contracts provide. Section 365(a) gives debtors a right to walk away before the contract's end (with the creditor's entitlement converted to a claim for damages), not a right to obtain extra benefits without paying for them. In the main, and here, bankruptcy law follows non-bankruptcy entitlements.

*Id.* at 637 (citing *Bildisco*, 465 U.S. 513, 79 L. Ed. 2d 482, 104 S. Ct. 1188; *Raleigh v. Illinois Dept of Revenue*, 530 U.S. 15, 20, 147 L. Ed. 2d 13, 120 S. Ct. 1951 (2000); *Butner v. United States*, 440 U.S. 48, 59 L. Ed. 2d 136, 99 S. Ct. 914 (1979)). The 10th Circuit has expressed similar views in *Country World Casinos, Inc. v. Tommyknocker Casino Corp. (In re Country World Casinos, Inc.)*, 181 F.3d 1146 (10th Cir. 1999), in upholding "the principle that a party to a contract cannot claim

its benefits where he is the first to violate its terms.” *Id.* at 1150 (quoting *Western Plains Serv. Corp. v. Ponderosa Dev. Corp.*, 769 F.2d 654, 657 (10th Cir. 1985)). *See also*, *Cajun Elec. Members Comm. v. Mabey (In re Cajun Elec. Power Coop., Inc.)*, 230 B.R. 693, (Bankr. M.D.-La. 1999), (assumption not permitted where structure of ongoing performance is breach of agreement).

17. Here, several things will happen that upend the rationale and plain language of the Master Services Agreement. First, the Debtors are required not to put traffic onto Unipoint’s enhanced platform that would subject Unipoint to liability or attorneys’ fees defending even specious claims. Second, Vartec is required to indemnify Unipoint for any liability or attorneys’ fees occasioned by such conduct. Prior to the approval of Comtel as the purchaser and the entry by the Debtors and Comtel into the Stipulation, Unipoint was one of three defendants. Unipoint will be the only remaining solvent defendants subject to its ability to plead in Comtel and/or Vartec as third party defendants going forward. Indeed, absent bankruptcy, the MSA gives Unipoint the choice of requesting indemnification or terminating its services if it was in doubt of the Debtors’ ability to indemnify it. Because the Debtors are released from liability, they have no further incentive to cooperate with Unipoint in avoiding local access charges prior to the Final Closing under the APA. Unipoint’s contract requires that Unipoint be indemnified for any such charges. The Debtors and the RTFC cannot profit from Unipoint’s services without shouldering the corresponding burden of indemnification as an administrative expense, in other words, if the estate is to benefit from the MSA, it must comply with all of its terms, not just some of them.

18. The Carrier Consent Order was negotiated and entered in the early days of the case and, given the sale of substantially all of the Debtors’ assets, no longer provides sufficient protection to Unipoint. By its terms, the Carrier Consent Order merely provides a invoicing and “true-up” mechanism for the Debtors and their carriers or service providers for post-petition service

charges. The Carrier Consent Order does not contemplate a sale of all assets by the Debtors, or the type of litigation claims which may now be incurred by Unipoint as a result of the sale and the proposed Stipulation. Unipoint requests that the Carrier Consent Order be supplemented to provide Unipoint with the additional adequate protection set forth herein.

**B. Motion to Compel Assumption or Rejection**

19. In the alternative to Unipoint being provided adequate protection in the form of escrowing funds sufficient to fund any administrative claim for indemnification, Unipoint requests that the Debtors be required to assume or reject the MSA. Under the standards of determining what constitutes a reasonable time to assume or reject under section 365(d)(2), the court should consider: (i) the damage the non-debtor will suffer beyond the compensation available under the Bankruptcy Code; (ii) the importance of the contract to the debtor's business and reorganization; (iii) whether the debtor has had sufficient time to appraise its financial situation and the potential value of its assets in formulating a plan; and (iv) whether exclusivity has terminated. *Theater Holding Corp. v. Mauro*, 681 F.2d 102, 105-06 (2d. Cir. 1982); *In re Hernandez*, 287 B.R. 795, 806 (Bankr. D. Ariz. 2002). Under these factors, given the Debtors' likely administrative insolvency and the sale of substantially all of its assets to Comtel, and given the undue risks which are being placed upon Unipoint as described herein, requiring assumption or rejection at this time is entirely appropriate. See, e.g., *In re Templeton*, 154 B.R. 930, 933 (Bankr. W.D. Tex. 1993) (creditor suffering an economic loss warranted assumption or rejection); accord *In re Texas Import Co.*, 360 F.2d 582, 584 (5<sup>th</sup> Cir. 1966) (creditor may ask court to compel assumption or rejection).

20. Under the terms of the APA, 5.11(c), risk of administrative claims for assumed contracts shifts to the Buyer. Under these terms, at any time prior to Final Closing, the Buyer may designate contracts to be assumed, and, upon assumption, the Buyer takes full responsibility for any

cure costs and liability. In addition, the terms of the MSA are relatively low-risk term permitting termination of services on relatively short notice. As such, assumption would not pose an undue risk on the estate compared to the risk being borne by Unipoint.

WHEREFORE, PREMISES CONSIDERED, Unipoint Holdings, Inc. respectfully requests that after notice and hearing, the Carrier Consent Order be supplemented to provide additional adequate protection to Unipoint as described herein pursuant to 11 U.S.C. §§ 105, 361, 363 and 365, or, in the alternative, to require the Debtors to assume or reject the MSA, and for any such other and further relief to which Unipoint may be justly entitled.

Respectfully submitted,

BROWN McCARROLL, L.L.P.  
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512-226-7320 (telecopy)

By: /s/ Kell C. Mercer

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ATTORNEYS FOR UNIPOINT  
HOLDINGS, INC.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been sent, via ECF (as indicated) or United States first-class mail, to all parties listed on the attached Service List. on this 17<sup>th</sup> day of August, 2005.

/s/ Kell C. Mercer  
Kell C. Mercer

# **EXHIBIT H**

**AT&T MASTER AGREEMENT**  
**MA Reference No. 120783**

CUSTOMER ("Customer")	AT&T ("AT&T")
Transcom Enhanced Services, LLC	AT&T Corporation
CUSTOMER Address	AT&T Address
1825 W. John Carpenter Freeway #500 Irving TX 75063 USA	55 Corporate Drive, Bridgewater, NJ 08807
CUSTOMER Contact	AT&T Contact
Name: Chad Frazier Title: President Telephone: 972-792-3745 Fax: 972-689-2775 Email:	Master Agreement Support Team Email: <a href="mailto:mast@att.com">mast@att.com</a>

This Agreement consists of the attached General Terms and Conditions and all schedules, exhibits and service order attachments ("Attachments") appended hereto or subsequently signed by the parties, and that reference this Agreement (collectively, this "Agreement"). In the event of a conflict between the General Terms and Conditions and any Attachment, the Attachment shall take precedence.

This Agreement shall become effective when signed by authorized representatives of both parties and shall continue in effect for as long as any Attachment remains in effect, unless earlier terminated in accordance with the provisions of this Agreement. The term of each Attachment is stated in the Attachment.

**AGREED:**

CUSTOMER: Transcom Enhanced Services, LLC

By: Chad Frazier  
 (Authorized Signature)  
Chad Frazier  
 (Typed or Printed Name)  
President  
 (Title)  
6/23/03  
 (Date)

**AGREED:**

AT&T: AT&T Corp. (If International insert name of AT&T Signing Entity)

By: Frances M. Mikulic  
 (Authorized Signature)  
Frances M. Mikulic  
 (Typed or Printed Name)  
District Manager  
 (Title)  
7-1-03  
 (Date)

**Exhibit A**

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**GENERAL TERMS AND CONDITIONS**

The following terms and conditions shall apply to the provision and use of Services provided by AT&T pursuant to this Agreement.

Any AT&T Affiliate or Customer Affiliate may sign an Attachment in its own name and such Affiliate contract will be considered a separate, but associated, contract, incorporating these General Terms and Conditions (with the Affiliate being substituted for AT&T and Customer, as applicable); provided, however, that AT&T and Customer shall be responsible for their respective Affiliates' performance pursuant to such Affiliate contract.

**1.0 DEFINITIONS**

1.1 "Affiliate" of a party means any entity that controls, is controlled by or is under common control with such party.

1.2 "AT&T", for purposes of all remedies and limitations of liability set forth in this Agreement or any Attachment means AT&T, its Affiliates, and its and their employees, directors, officers, agents, representatives, subcontractors, interconnection service providers and suppliers.

1.3 "AT&T Software" means all Software other than Third-Party Software.

1.4 "Content" means information made available, displayed or transmitted (including, without limitation, information made available by means of an HTML "hot link", a third party posting or similar means) in connection with a Service, including all trademarks, service marks and domain names contained therein, Customer and User data, and the contents of any bulletin boards or chat forums, and, all updates, upgrades, modifications and other versions of any of the foregoing.

1.5 "Customer", for purposes of all remedies and limitations of liability set forth in this Agreement or any Attachment means Customer, its Affiliates, and its and their employees, directors, officers, agents, and representatives.

1.6 "Damages" means collectively all injury, damage, liability, loss, penalty, interest and expense incurred.

1.7 "INFORMATION" means proprietary information of either party that is disclosed to the other party in the course of performing this Agreement, provided such information (except for Customer Content) is in written or other tangible form that is clearly marked as "proprietary" or "confidential".

1.8 "Marks" means each party's trade names, logos, trademarks, service marks or other indicia of origin.

1.9 "Service" means the service and/or equipment provided under the applicable Attachment.

1.10 "Software" means all software and associated written and electronic documentation and data furnished pursuant to the Attachments.

1.11 "Third-Party Software" means Software that bears a copyright notice of an unrelated third party.

1.12 "User" means anyone who uses or accesses any Service purchased by Customer under this Agreement, including Customer Affiliates.

**2.0 CHARGES AND BILLING**

2.1 Customer shall pay AT&T for Customer's and Users' use of the Services at the rates and charges specified in the Attachments, without deduction, setoff or

delay for any reason. Charges set forth in the Attachments are exclusive of any applicable taxes. At Customer's request and with AT&T's consent (which may be withheld if AT&T determines there would be operational impediments or an inability to claim tax credits), Customer's Affiliates will be invoiced separately and AT&T will accept payment from such Affiliates; provided, however, Customer is responsible if its Affiliate does not pay charges in accordance with this Agreement. Customer may be required at any time to pay a deposit if AT&T determines that Customer is not creditworthy.

2.2 Customer shall pay all taxes (excluding those on AT&T's net income), duties, levies, shipping charges and other similar charges (and any related interest and penalties) relating to the sale, transfer of ownership, installation, license, use or provision of the Services, except to the extent a valid tax exemption certificate is provided by Customer to AT&T prior to the delivery of Services. To the extent Customer is required to withhold or deduct from payments due to AT&T, non-U.S. income taxes that are allowable as a credit against AT&T's U.S. income taxes, Customer must reduce such tax to the maximum extent possible giving effect to the applicable Tax Convention and must furnish AT&T with such evidence as may be required by U.S. taxing authorities to establish that such tax has been paid so that AT&T may claim the credit.

2.3 Payment is due within thirty (30) days after the date of the invoice and must refer to the invoice number. Charges will be quoted and invoices shall be paid in U.S. dollars, except where a particular Attachment provides for local currency quoting, invoicing and payment. Restrictive endorsements or other statements on checks accepted by AT&T will not apply. Customer shall reimburse AT&T for all costs (including reasonable attorney fees) associated with collecting delinquent or dishonored payments. At AT&T's option, interest charges may be added to any past due amounts at the lower of 1.5% per month (18% per annum) or the maximum rate allowed by law.

2.4 In the event of a bona fide dispute over a charge specifically identified by Customer through written notice to AT&T stating the amount disputed and the reason for withholding payment, payment of the identified charge will not be considered past due pending investigation by AT&T, provided that nothing herein shall absolve Customer from promptly paying all undisputed charges and submitting reasonable security for payment of any withheld amounts upon demand by AT&T. Upon completion of AT&T's investigation of such disputed charge, AT&T will advise Customer of the results of the investigation and will make any adjustments deemed appropriate in AT&T's sole discretion. Payment of any disputed charges that are determined to be correct as a result of such investigation, plus interest charges (at AT&T's option) calculated from the date of AT&T's notice to Customer of the results of the investigation, at the lower of 1.5% per month (18% per annum) or the maximum

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rate allowed by law, must be paid upon AT&T's notice of the results of the investigation.

### 3.0 RESPONSIBILITIES OF THE PARTIES

3.1 AT&T agrees to provide Services to Customer, subject to the availability of the Services in accordance with the terms and conditions, and at the charges specified in the Attachments, consistent with all applicable laws and regulations.

3.2 Customer shall assure that Customer's and Users' use of the Services and Content will at all times comply with all applicable laws and regulations. AT&T reserves the right to terminate affected Attachments, suspend affected Services, and/or remove Customer's or Users' Content from the Services, if AT&T determines, in the exercise of its reasonable discretion, that such use or Content does not conform with the requirements set forth in this Agreement or interfere with AT&T's ability to provide Services to Customer or others or has reason to believe that Customer's or Users' use or Content may violate any laws or regulations. AT&T's actions or inaction under this Section shall not constitute review or approval of Customer's or Users' use or Content. AT&T will use reasonable efforts to provide notice to Customer before taking action under this Section.

### 4.0 USE OF INFORMATION

4.1 This Agreement shall be deemed to be AT&T and Customer's INFORMATION. Customer's Content shall be deemed to be Customer's INFORMATION.

4.2 Each party's INFORMATION shall, for a period of three (3) years following its disclosure (except in the case of Software, for an indefinite period): (i) be held in confidence; (ii) be used and transmitted between countries only for purposes of performing this Agreement (including in the case of AT&T, the ability to monitor and record Customer transmissions in order to detect fraud, check quality, and to operate, maintain and repair the Services); and using the Services; and (iii) not be disclosed except to the receiving party's employees, agents and contractors having a need-to-know (provided that such agents and contractors are not direct competitors of the other party and agree in writing to use and disclosure restrictions as restrictive as this Article 4), or to the extent required by law (provided that prompt advance notice is provided to the disclosing party to the extent practicable).

4.3 The restrictions in this Article shall not apply to any information that: (i) is independently developed by the receiving party; or (ii) is lawfully received by the receiving party free of any obligation to keep it confidential; or (iii) becomes generally available to the public other than by breach of this Agreement.

4.4 Both parties agree to comply with privacy laws applicable to their respective businesses. Customer shall obtain any User consents legally required relating to handling of User's Content. If Customer believes that, in the course of providing Services under this Agreement, AT&T will have access to data Customer does not want AT&T personnel to comprehend, Customer should encrypt such data so that it will be unintelligible.

### 5.0 PUBLICITY AND MARKS

5.1 Neither party may issue any public statements or announcements relating to this Agreement without the prior written consent of the other party.

5.2 Each party agrees not to display or use, in advertising or otherwise, any of the other party's Marks without the other party's prior written consent, provided that such consent may be revoked at any time.

### 6.0 SOFTWARE

6.1 AT&T grants Customer a personal, non-transferable and non-exclusive license (without the right to sublicense) to use Software, in object code form, solely in connection with the Services and solely in accordance with applicable written and electronic documentation. Customer will refrain from taking any steps to reverse assemble, reverse compile or otherwise derive a source code version of the Software. The Software shall at all times remain the sole and exclusive property of AT&T or its suppliers.

6.2 Customer shall not copy or download AT&T Software, except that Customer shall be permitted to make two (2) copies of AT&T Software, one for archive and the other for disaster recovery purposes. Any copy must contain the same copyright notices and proprietary markings as the original Software.

6.3 Customer shall assure that Customer's Users comply with the terms and conditions of this Article 6.

6.4 The term of the license granted hereunder shall be coterminous with the Attachment which covers the Software and/or related Services.

6.5 Customer agrees to comply with any terms and conditions that are provided with any Third-Party Software and, in the event of a conflict, such Third-Party terms and conditions will take precedence over this Article 6 as to such Third-Party Software.

6.6 AT&T warrants that all AT&T Software will perform substantially in accordance with its applicable published specifications for the term of the Attachment that covers the Software. If Customer returns to AT&T, within such period, any AT&T Software that does not comply with this warranty, then AT&T, at its option, will either repair or replace the portion of the AT&T Software that does not comply or refund any amount Customer prepaid for the time periods following return of such failed or defective AT&T Software to AT&T. This warranty will apply only if the AT&T Software is used in accordance with the terms of this Agreement and is not altered, modified or tampered with by Customer or Users.

### 7.0 ADJUSTMENTS TO MINIMUM ANNUAL REVENUE COMMITMENTS

In the event of a business downturn beyond Customer's control, or a corporate divestiture, merger, acquisition or significant restructuring or reorganization of Customer's business, or network optimization using other AT&T Services, or reduction of AT&T's rates and charges, or force majeure events, any of which significantly impairs Customer's ability to meet Customer's minimum annual revenue commitments, if any, under an Attachment, AT&T will offer to adjust the affected minimum annual revenue commitments so as to reflect Customer's reduced traffic volumes, after taking into account the effect of such a reduction on AT&T's costs and the AT&T prices that would otherwise be available at the revised minimum annual revenue commitment levels. If the

parties reach mutual agreement on revised minimum annual revenue commitments, AT&T will amend or replace the affected Attachment, as applicable. Notwithstanding the foregoing, this provision shall not apply to a change resulting from a decision by Customer to transfer portions of Customer's traffic or projected growth to service providers other than AT&T. Customer must give AT&T written notice of the conditions Customer believes will require the application of this provision. This provision does not constitute a waiver of any charges, including, but not limited to, monthly recurring charges and shortfall charges, incurred by Customer prior to amendment or replacement of the affected Attachment.

#### 8.0 FORCE MAJEURE

Neither AT&T nor Customer shall be liable for any delay, failure in performance, loss or damage due to: fire, explosion, power blackout, earthquake, flood, the elements, strike, embargo, labor disputes, acts of civil or military authority, war, acts of God, acts or omissions of carriers or suppliers, acts of regulatory or governmental agencies, or other causes beyond such party's reasonable control, whether or not similar to the foregoing, except that Customer's obligation to pay for charges incurred for Services received by Customer shall not be excused.

#### 9.0 LIMITATIONS OF LIABILITY

9.1 EITHER PARTY'S ENTIRE LIABILITY AND THE OTHER PARTY'S EXCLUSIVE REMEDIES, FOR ANY DAMAGES CAUSED BY ANY SERVICE DEFECT OR FAILURE, OR FOR OTHER CLAIMS ARISING IN CONNECTION WITH ANY SERVICE OR OBLIGATIONS UNDER THIS AGREEMENT SHALL BE:

- (i) FOR BODILY INJURY OR DEATH TO ANY PERSON, OR REAL OR TANGIBLE PROPERTY DAMAGE, NEGLIGENTLY CAUSED BY A PARTY, OR DAMAGES ARISING FROM THE WILLFUL MISCONDUCT OF A PARTY OR ANY BREACH OF ARTICLES 4 OR 5, THE OTHER PARTY'S RIGHT TO PROVEN DIRECT DAMAGES;
- (ii) FOR DEFECTS OR FAILURES OF SOFTWARE, THE REMEDIES SET FORTH IN ARTICLE 6;
- (iii) FOR INTELLECTUAL PROPERTY INFRINGEMENT, THE REMEDIES SET FORTH IN ARTICLE 11;
- (iv) FOR DAMAGES OTHER THAN THOSE SET FORTH ABOVE AND NOT EXCLUDED UNDER THIS AGREEMENT, EACH PARTY'S LIABILITY SHALL BE LIMITED TO PROVEN DIRECT DAMAGES NOT TO EXCEED PER CLAIM (OR IN THE AGGREGATE DURING ANY TWELVE (12) MONTH PERIOD) AN AMOUNT EQUAL TO THE TOTAL NET PAYMENTS MADE BY CUSTOMER FOR THE AFFECTED SERVICE IN THE RELEVANT COUNTRY DURING THE THREE (3) MONTHS PRECEDING THE MONTH IN WHICH THE DAMAGE OCCURRED. THIS SHALL NOT LIMIT CUSTOMER RESPONSIBILITY FOR THE PAYMENT OF ALL PROPERLY DUE CHARGES UNDER THIS AGREEMENT.

(v) THE LIMITATIONS IN THIS SECTION 9.1 ARE NOT INTENDED TO PRECLUDE A PARTY FROM SEEKING INJUNCTIVE RELIEF FROM A COURT OF COMPETENT JURISDICTION IN THE EVENT OF A VIOLATION BY THE OTHER PARTY OF ARTICLE 4 OR

ARTICLE 5 OR CUSTOMER'S OR USERS' VIOLATION OF SECTION 3.2 OR ARTICLE 6.

9.2 EXCEPT FOR THE PARTIES' ARTICLE 11 OBLIGATIONS, NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, PUNITIVE, RELIANCE OR SPECIAL DAMAGES, INCLUDING WITHOUT LIMITATION, DAMAGES FOR LOST PROFITS, ADVANTAGE, SAVINGS OR REVENUES OF ANY KIND OR INCREASED COST OF OPERATIONS.

9.3 AT&T SHALL NOT BE LIABLE FOR ANY DAMAGES ARISING OUT OF OR RELATING TO: INTEROPERABILITY, ACCESS OR INTERCONNECTION OF THE SERVICES WITH APPLICATIONS, EQUIPMENT, SERVICES, CONTENT OR NETWORKS PROVIDED BY CUSTOMER OR THIRD PARTIES; SERVICE LEVELS, DELAYS OR INTERRUPTIONS (EXCEPT WHERE A CREDIT IS EXPLICITLY SET FORTH IN AN ATTACHMENT OR SERVICE GUIDE) OR LOST OR ALTERED MESSAGES OR TRANSMISSIONS; OR, UNAUTHORIZED ACCESS TO OR THEFT, ALTERATION, LOSS OR DESTRUCTION OF CUSTOMER, USERS' OR THIRD PARTIES' APPLICATIONS, CONTENT, DATA, PROGRAMS, INFORMATION, NETWORK OR SYSTEMS.

9.4 EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT, AT&T MAKES NO REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, AND SPECIFICALLY DISCLAIMS ANY REPRESENTATION OR WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE OR NON-INFRINGEMENT OR ANY REPRESENTATION OR WARRANTY ARISING BY USAGE OF TRADE, COURSE OF DEALING OR COURSE OF PERFORMANCE.

9.5 THE LIMITATIONS OF LIABILITY SET FORTH IN THIS AGREEMENT SHALL APPLY: (i) REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT, STRICT LIABILITY OR OTHERWISE; AND (ii) WHETHER OR NOT DAMAGES WERE FORESEEABLE. THESE LIMITATIONS OF LIABILITY SHALL SURVIVE FAILURE OF ANY EXCLUSIVE REMEDIES PROVIDED IN THIS AGREEMENT.

9.6 The parties acknowledge that the limitations on liability set out in this Article 9 have been negotiated between the parties and are regarded by the parties as being reasonable in all the circumstances.

#### 10.0 TERMINATION

10.1 If a party fails to perform or observe any material term or condition of this Agreement and the failure continues unremedied for thirty (30) days after receipt of written notice, (i) the other party may terminate for cause any Attachment affected by the breach, or (ii) where the failure is a non-payment by Customer of any charge when due, other than a charge being disputed by Customer pursuant to Section 2.4, AT&T may, at its option, terminate or suspend Service and/or require a deposit under affected Attachments.

10.2 An Attachment may be terminated immediately upon written notice by either party if the other party: (i) becomes insolvent or involved in a liquidation or termination of its business, files a bankruptcy petition, has an involuntary bankruptcy petition filed against it (if not dismissed within thirty (30) days of filing), becomes

adjudicated bankrupt, or becomes involved in an assignment for the benefit of its creditors; or (ii) has violated the other party's Marks or materially breached any provision of Article 4.

10.3 Customer shall be responsible for payment of all charges under a terminated Attachment incurred as of the effective date of termination. Customer shall also be liable to AT&T for Termination Charges, if specified in a terminated Attachment, in the event that AT&T terminates under Section 10.1 or 10.2, or Customer terminates without cause as may be allowed in an Attachment.

10.4 Termination by either party of an Attachment does not waive any other rights or remedies it may have under this Agreement. Termination or suspension of an Attachment shall not affect the rights and obligations of the parties under any other Attachment.

10.5 The parties acknowledge that AT&T's Tariffs and Service Guides, which may be modified from time to time by AT&T, may govern or affect certain Services. AT&T may amend an applicable Tariff or Service Guide from time to time consistent with this Agreement, provided, however, that if AT&T revises an applicable Tariff or Service Guide in a manner that is material and adverse to Customer and AT&T does not effect revisions that remedy such adverse and material effect within thirty (30) days after receipt of written notice from Customer, then Customer may, as its sole remedy, elect to terminate the affected Service components on thirty (30) days' written notice, given not later than ninety (90) days after Customer first learns of the event(s) giving rise to the termination right. However, a revision to a Tariff or Service Guide shall not be considered material and adverse to Customer if (i) it affects only Services or Service components not in substantial use by Customer at the time of the revision or (ii) it changes Rates and Charges that are not fixed (stabilized) in an Attachment.

#### 11.0 FURTHER RESPONSIBILITIES

11.1 AT&T agrees to defend or settle any claim against Customer, and to pay all Damages that a court may award against Customer in any suit, that alleges a Service infringes any patent, trademark, copyright or trade secret, except where the claim or suit arises out of or results from: Customer's or User's Content; modifications to the Service or combinations of the Service with non-AT&T services or products, by Customer or others; AT&T's adherence to Customer's written requirements; or, use of the Service in violation of this Agreement. Customer agrees to defend or settle any claim against AT&T and to pay all Damages that a court may award against AT&T in any suit that alleges a Service infringes any patent, trademark, copyright or trade secret, due to any of the exceptions in the preceding sentence.

11.2 Whenever AT&T is responsible under Section 11.1, AT&T may at its option either procure the right for Customer to continue using, or may replace or modify the alleged infringing Service so that the Service becomes noninfringing, but if those alternatives are not reasonably achievable, AT&T may terminate the affected Service without liability other than as stated in Section 11.1.

11.3 AT&T grants to Customer the right to permit Users to access and use the Services, provided that Customer shall remain solely responsible for such access and use. Except to the extent AT&T is obligated to indemnify

Customer under this Article 11, Customer shall defend or settle any claim against AT&T and pay all Damages that a court may award against AT&T in any third party suit relating to Customer's or Users' use of the Service or Content or performance of the Service.

11.4 The indemnified party under this Article 11: (i) must notify the other party in writing promptly upon learning of any claim or suit for which indemnification may be sought, provided that failure to do so shall have no effect except to the extent the other party is prejudiced thereby; (ii) shall have the right to participate in such defenses or settlement with its own counsel and at its sole expense, but the other party shall have control of the defense or settlement; and (iii) shall reasonably cooperate with the defense.

#### 12.0 EXPORT CONTROL

12.1 The parties acknowledge that equipment, products, Software, and technical information (including, but not limited to, technical assistance and training) provided under this Agreement may be subject to export laws and regulations, and any use or transfer of the equipment, products, Software, and technical information must be in compliance with all applicable regulations. The parties will not use, distribute, transfer, or transmit the equipment, products, Software, or technical information (even if incorporated into other products) except in compliance with all applicable export regulations. If requested by either party, the other party agrees to sign written assurances and other export-related documents as may be required to comply with all applicable export regulations.

12.2 In the event any necessary export license cannot be obtained within six (6) months after application therefor, neither party shall have further obligations with respect to providing or purchasing and, if applicable, Customer shall return to AT&T, the equipment, products, Software, or technical information that is the subject matter of the unsuccessful export application.

#### 13.0 GENERAL PROVISIONS

13.1 Any supplement to or modification or waiver of any provision of this Agreement must be in writing and signed by authorized representatives of both parties. A waiver by either party of any breach of this Agreement shall not operate as a waiver of any other breach of this Agreement.

13.2 This Agreement may not be assigned by either party without the prior written consent of the other, except that either party may, without the other party's consent, assign this Agreement or any Attachment to a present or future Affiliate or successor, provided that any such assignment by Customer shall be contingent upon AT&T determining the assignee to be creditworthy and in compliance with any eligibility criteria for the Services. AT&T may subcontract work to be performed under this Agreement, but shall retain responsibility for all such work.

13.3 If any portion of this Agreement is found to be invalid or unenforceable, the remaining provisions shall continue in effect and the parties shall promptly negotiate to replace such portions that cannot be implemented as agreed and that are essential parts of this Agreement. The negotiations shall be conducted in good faith and shall preserve the intention of the parties as expressed in

this Agreement to the extent possible, and in a manner that preserves the equities of the bargain.

13.4 Any legal action arising in connection with this Agreement must begin within two (2) years after the cause of action arises.

13.5 All required notices under this Agreement shall be in writing and either mailed by certified or registered mail, postage prepaid return receipt requested, sent by express courier or hand delivered and addressed to each party at the address set forth on the cover page of this Agreement or, if the notice relates to a specific Attachment, the address set forth in such Attachment, or such other address that a party indicates in writing.

13.6 The construction, interpretation and performance of this Agreement shall be governed by the substantive law of the State of New York, excluding its choice of law rules, and applicable laws and regulations of the United States of America. The United Nations Convention on Contracts for International Sale of Goods shall not apply. The parties consent to the exclusive jurisdiction of the courts located in New York City, USA.

13.7 This Agreement does not provide any third party (including Users) with any remedy, claim, liability, reimbursement, cause of action or other right or privilege.

13.8 The respective obligations of Customer and AT&T, which by their nature would continue beyond the termination or expiration of any Attachment or this Agreement, including, without limitation, the obligations regarding Use of Information, Publicity and Marks, Further Responsibilities and Limitations of Liability, shall survive termination or expiration.

13.9 The authentic language of this Agreement is English. In the event of a conflict between this Agreement and any translation, the English version will take precedence.

13.10 THIS AGREEMENT CONSTITUTES THE ENTIRE AGREEMENT BETWEEN THE PARTIES WITH RESPECT TO THE SERVICES. THIS AGREEMENT SUPERSEDES ALL PRIOR AGREEMENTS, PROPOSALS, REPRESENTATIONS, STATEMENTS OR UNDERSTANDINGS, WHETHER WRITTEN OR ORAL CONCERNING THE SERVICES, OR THE RIGHTS AND OBLIGATIONS RELATING TO THE SERVICES. THIS AGREEMENT SHALL NOT BE MODIFIED, OR SUPPLEMENTED BY ANY WRITTEN OR ORAL STATEMENTS, PROPOSALS, REPRESENTATIONS, ADVERTISEMENTS, SERVICE DESCRIPTIONS OR CUSTOMER PURCHASE ORDER FORMS NOT EXPRESSLY SET FORTH IN THIS AGREEMENT OR AN ATTACHMENT.

**AT&T Service Order Attachment - Local Services Cover Page**

<b>CUSTOMER Legal Name</b> Transcom Enhanced Services, LLC	<b>AT&amp;T Corp. ("AT&amp;T")</b> AT&T Corp.	<b>AT&amp;T Sales Contact Name</b> Simplify Telecom Solutions Brent Saxon
<b>CUSTOMER Address</b> 1925 W. John Carpenter Freeway Irving TX 75063	<b>AT&amp;T Address</b> 55 Corporate Drive Bridgewater, New Jersey 08807	<b>AT&amp;T Sales Contact Address</b> 2531 I-45 North The Woodlands TX 77380
<b>CUSTOMER Contact</b> Name: Chad Frazier Title: President Telephone: 972-792-3745 Fax: 972-889-2775 Email:	<b>AT&amp;T Contact</b> Name: Master Agreement Support Team Email: mast@att.com	<b>AT&amp;T Sales Contact Information</b> Telephone: 281-465-6000 Fax: 713-867-5940 Email: brent@simplytelcom.com Branch Manager: John Tidwell Sales Strata: SMB Sales Region: Southern
<b>CUSTOMER Billing Address</b> 1925 W. John Carpenter Freeway suite 500 Irving TX 75063	<b>Local Private Line Customer Account Information</b> Billing Account Number/BAN:	

This Service Order Attachment is an Attachment to the Master Agreement between Customer and AT&T dated ("Agreement"), and is an integral part of that Agreement.

This Attachment consists of this Cover Page, Service Order Attachment and the Applicable Tariffs incorporated therein by reference. The order of priority in the event of inconsistency among terms shall be the Service Order Attachment, the Applicable Tariffs, then the Master Agreement.

This Service Order Attachment may relate to services provided by, and tariffs filed by, AT&T or by any of its subsidiaries, including Teleport Communications Group Inc. (TCG) and its subsidiaries and affiliates. Bills may be rendered in the name of AT&T, TCG, or any affiliate of AT&T or TCG.

**SIGNATURE BELOW BY YOUR AUTHORIZED REPRESENTATIVE IS YOUR CONSENT TO THE TERMS AND CONDITIONS OF THIS SERVICE ORDER ATTACHMENT.**

**CUSTOMER:**  
Transcom Enhanced Services, LLC

Legal Name  
by: Chad Frazier  
Authorized Signature  
Chad Frazier  
Printed Name  
President  
Title  
6/23/03  
Date

Last Updated: 12/23/02  
na-local/voicetcg-sig

**AT&T CORP.**

By: Frances M. Mikule  
Authorized Signature  
Frances M. Mikule  
Printed Name  
AT&T District Manager  
Title  
7-11-03  
Date

Last Updated: 12/23/02  
na-local/voicetcg-sig

APP 0234

This is an Addendum to the Service Order Attachment, providing the following terms and conditions, which are applicable to the Services/Offerings Provided in the Service Order Attachment.

The Customer certifies that (1) it is an Enhanced or Information Service Provider, (2) it provides "phone-to-phone" IP telephony services ("VoIP Services"); (3) such VoIP Services are exempt from the access charges applicable to circuit switched interexchange calls by virtue of the Federal Communications Commission's (FCC's) established policy of exempting all VoIP Services from access charges pending the future adoption of nondiscriminatory regulations on the subject, and, hence (4) Customer's VoIP Services can lawfully be provided over and over local services. The acknowledgements in this section shall in no way expand, enlarge or increase AT&T's duties, obligations and liabilities, which shall remain as provided in the Applicable Tariffs. The Customer further agrees to reimburse AT&T (subject to the paragraph immediately following) for any access costs incurred on the VoIP Service traffic, for any reason, but in particular due to (i) a determination that the customer is not entitled to Enhanced or Information Service Provider status or a change in federal or state regulation related to the type of VoIP Services it offers (including a determination that such services are subject to the payment of intrastate or interstate access charges) or (ii) Customer's failure to provide the Calling Party Number ("CPN") with each call.

In the event of (a) a ruling by the FCC or other governmental agency of competent jurisdiction that the VoIP Services are subject to payment of intrastate or interstate access charges or (b) AT&T notifies Customer of an incumbent Local Exchange Carrier (ILEC) billing AT&T access charges on the VoIP Services, Customer may terminate the circuits to which such ruling or to which such access charges apply ("affected circuits") by written notice received by AT&T within fifteen (15) days of such ruling or AT&T's notice to Customer of such access billing by an ILEC. Such notice must request that the affected circuits be disconnected within thirty (30) days of date of the notice. If AT&T does not receive notice as provided in this paragraph, Customer shall pay all access charges commencing upon the earlier of the date of (a) or (b) in the preceding sentence.

Customer further agrees that for each call over a Primary Rate Interface ("PRI") that is not a local call to the telephone number assigned to that PRI (based on the local calling area of the applicable AT&T/TCG tariff), Customer will be charged AT&T/TCG's applicable toll rates for the call.

AT&T PROPRIETARY  
Page 1 of 1

Transcom Enhanced Services LLC- Addendum  
081603/081603

APP 0235

# **EXHIBIT I**

# McLeodUSA

## MASTER SERVICES AGREEMENT Carrier Accounts

This Agreement is made by McLeodUSA Telecommunication Services, Inc., an Iowa corporation with its principal offices at McLeodUSA Technology Park, 6400 C Street SW, Cedar Rapids, Iowa 52404 ("McLeodUSA"), and Unipoint Services, Inc., a Texas corporation with its principal offices at 6500 River Place Blvd, Bldg 2, Ste 200, Austin, TX 78730 ("Customer"), effective November 5, 2003. McLeodUSA and Customer may also be referred to as the "Parties" or "Party" as the context allows.

The Parties agree as follows:

1. **Entire Agreement.** The following terms and conditions apply to the provision and use of Services by the Customer as described in any attached addenda, exhibits, schedules and other documents which are specifically made a part of the Agreement. This Agreement, and any attachments hereto requiring signature, have no force or effect until signed by the authorized McLeodUSA representative.
2. **Defined Terms.** The following terms are used as defined. The definitions apply not only to this document but also to any attachments.  
"Agreement," means this document titled Master Services Agreement and any attached addenda, exhibits, schedules or other documents specifically referred to and incorporated.  
"AUP," means the McLeodUSA Acceptable Use Policy governing the use of the Services, which is available at, [www.mcleodusa.com](http://www.mcleodusa.com).  
"Deposit," means a cash deposit, irrevocable letter of credit and/or individual guaranty, or other form of security in form and amount acceptable to McLeodUSA.  
"Dispute," means all controversies or claims arising out of or relating to this Agreement, including any breach or billing dispute.  
"Due Date," means the date on any invoice or bill presented to the Customer by which payment is due.  
"Effective Date" means the date entered in the opening paragraph of the Agreement, and which the Parties intended to be the date the Agreement takes effect.  
"Equipment," means facilities or equipment provided, owned or installed by McLeodUSA.  
"Offset Allowance," means any fees, charges or other amounts due and owing under this Agreement or other agreements between the parties, or their subsidiaries or affiliates, which the parties may choose to offset against amounts due and owing in other agreements between the Parties.  
"Services," means those facilities, products and services provided by McLeodUSA under the Agreement.
3. **Term.** This Agreement is in effect for One (1) Year from the Effective Date. The Agreement will automatically renew for successive terms, equal in length to the prior term, unless a Party provides written notice of termination at least ninety (90) days prior to the end of the then current term.
4. **Billing and Payment Terms.** (a) **Rendering of Bills.** McLeodUSA shall bill charges and apply credits as provided for in attachments to this Agreement. McLeodUSA shall bill in advance charges for all Services to be provided during the ensuing month except for charges dependent on usage, which shall be billed in arrears. Adjustments for the quantities of Service established or discontinued in any billing period during the term will be prorated to the number of days based on a thirty (30) day month, if applicable.  
(b) **Payment of Bills.** Customer shall pay all invoices by the Due Date (not 30 from the invoice date). Amounts become past due if not received by the Due Date. The unpaid balance of any past due amounts not received by the end of Customer's monthly billing cycle shall bear interest at the rate of one and one-half percent (1.5%) per month, or the highest rate allowed by law, whichever is less. Payment is not deemed made until received by McLeodUSA. All reasonable costs and expenses, including but not limited to attorneys' fees, expenses, court costs and service charges, incurred by McLeodUSA in collecting past due payments will be an expense of and charge to the Customer. Customer shall be solely responsible for all charges for Services, even if such charges were incurred through fraudulent or unauthorized use of the Services; unless McLeodUSA has actual knowledge of or is grossly negligent in discovering such fraudulent or unauthorized use and fails to inform the Customer.  
(c) **Taxes and Fees.** Except for taxes or assessments based on McLeodUSA net income, ad valorem, personal, and real property taxes imposed on McLeodUSA property, Customer shall be solely responsible for payment of all sales, use, property, gross receipts, excise, access, bylaws, franchise, value added, communications, Universal Service Fund, or other local, state and federal taxes, fees,

Customer's Initials



charges, or surcharges, however designated, imposed by any domestic or international government entity on or based upon the provision, sale or use of Services delivered by McLeodUSA.

(d) **Regulatory and Legal Changes.** McLeodUSA may elect or be required by law to file with the appropriate regulatory agency tariffs respecting the delivery of Services. In the event and to the extent that such tariffs are filed respecting Services ordered by Customer, the terms set forth in the applicable tariff shall govern McLeodUSA delivery of, and Customer's consumption or use of, such Services. If the tariff creates any adverse material impact on Customer, Customer may terminate the affected Service(s) without incurring any early termination liability.

(e) **Disputed Bills.** Customer may dispute any invoice in good faith but must timely pay the undisputed portion of the invoice in full and submit a documented claim for the disputed amount. All claims must be submitted to McLeodUSA within forty-five (45) days of the Due Date. If Customer does not submit a claim within such period and in the manner stated above, Customer waives all rights to dispute such charges.

5. **Credit Approval and Deposits.** The obligation to provide Services is contingent upon continuing credit approval by McLeodUSA. Upon request Customer shall deliver to McLeodUSA information concerning Customer's operations necessary to make the appropriate credit determination. McLeodUSA may require a Deposit prior to commencement of Services: (a) as a condition for its signing this Agreement or providing Services; (b) as a condition to its continuation of Services, but only when Customer's consumption of Services materially exceeds Customer's anticipated use; (c) when such Deposit is required in order to secure Customer's anticipated use; (d) when such Deposit is required in order to secure Customer's continued payment obligation, which Deposit shall be held by McLeodUSA as security for payment of charges; or (e) at anytime during the term of this Agreement, if in its reasonable discretion, Customer's financial condition changes in an adverse, material manner, with consideration given to the timeliness of Customer's payments. Requests for Deposit must be honored within five (5) business days, or McLeodUSA may terminate this Agreement for cause without liability on the part of McLeodUSA. If this Agreement, or any of the Services provided herein, has been terminated, the Deposit shall be applied to all charges and other amounts then due McLeodUSA. McLeodUSA agrees to refund the excess portion of the Deposit, if any, within forty-five (45) days following final settlement of Customer's account. The refunding or crediting of the Deposit in no way relieves Customer from complying with all terms and provisions contained in this Agreement or from tendering payments when due. McLeodUSA reserves the right to deny any Customer order for Services which, in its reasonable discretion, exceeds Customer's ability to pay. McLeodUSA reserves the right to immediately suspend Services provided to Customer hereunder if McLeodUSA, in its reasonable opinion, believes that there has been a fraudulent use of the Services or substantial misrepresentation with regards to use of the Services, on the part of the Customer. McLeodUSA agrees to notify Customer of any suspected or actual fraudulent use and allow Customer seven (7) business days from the date of notification to cure the actual or suspected fraudulent use of Services, after which McLeodUSA may terminate Services provided to Customer hereunder.

6. **Misuse of Service.** For applicable products, the Customer shall comply with the current version of the McLeodUSA AUP. Customer will be responsible for being informed of, and informing and educating its employees, representatives and customers regarding the AUP. McLeodUSA reserves the right to amend the AUP from time to time, effective upon the posting at the website address. This section does not obligate McLeodUSA to detect or report unauthorized or fraudulent use of Services.

7. **Assignability.** The Customer shall not assign this Agreement to any other entity or party without the express written consent of McLeodUSA. However, either Party shall have the right to assign, convey or otherwise transfer its rights, title, interest and obligations under this Agreement, in whole or in part, to any entity controlled by, controlling or under common control of the Party, or any entity into which the Party may be merged or consolidated or which purchases all or substantially all of the assets of the Party.

8. **Section Intentionally Omitted.**

9. **Limitation of Liability.** NEITHER PARTY SHALL BE LIABLE TO THE OTHER FOR ANY INCIDENTAL, INDIRECT, PUNITIVE, SPECIAL OR CONSEQUENTIAL DAMAGES OF ANY KIND INCLUDING, BUT NOT LIMITED TO, ANY LOSS OF USE, LOSS OF BUSINESS, OR LOSS OF PROFIT, AND REGARDLESS OF THE FORM OF THE ACTION, WHETHER IN CONTRACT, WARRANTY, STRICT LIABILITY OR TORT, INCLUDING WITHOUT LIMITATION, NEGLIGENCE OF ANY KIND, AND REGARDLESS WHETHER A PARTY WAS ADVISED, HAD REASON TO KNOW, OR IN FACT KNEW OF THE POSSIBILITY OF LIABILITY. MCLEODUSA SHALL NOT BE LIABLE FOR THE ACTS, OMISSIONS OR DELAYS CAUSED BY THIRD PARTY VENDORS. Unless otherwise provided for in this Agreement, any McLeodUSA liability to Customer for any damages of any kind shall be limited to an out-of-service credit determined by a pro-rated amount equal to the charges due for each twenty-four (24) hour period service has not been satisfactorily provided. Remedies under this Agreement are exclusive and limited to those expressly stated in the Agreement.

10. **Warranties.** Except as may otherwise be stated in this Agreement, THERE ARE NO WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

*AA*

11. **Acquired Entity.** In the event Customer or Customer's Affiliate acquires through purchase, merger, or other means of acquisition an entity as an Affiliate during the term of this Agreement, Customer and Affiliate may elect one of the following: (1) Affiliate may be deemed to be a joint party with Customer under this Agreement; or (2) if the Affiliate is also contracting with McLeodUSA for the same or similar services as provided for in this Agreement, then Customer and Affiliate may elect, provided the election will not adversely affect any volume or revenue commitments made in the aggregate by the Customer and the Affiliate, which agreement will govern the parties going forward. If alternative (2) is selected, Customer and Affiliate may terminate, without cost or liability, including any early termination liability or liquidated damages, one of the existing agreements and become joint parties under the remaining agreement ("Surviving Agreement"). Customer shall provide written notice to McLeodUSA that Customer and Affiliate are exercising such election, identifying which agreement will be terminated and which agreement shall remain effective among McLeodUSA, Customer, and Affiliate. For the purposes of this section, "Affiliate" shall mean any entity which controls, is controlled by, or is under common control with Customer; and "control" shall mean at least fifty percent (50%) ownership or at least fifty percent (50%) of the voting interests of the entity. The parties acknowledge and agree that the Surviving Agreement shall be amended to correctly reflect the parties' names, but in all other respects shall have identical rates, charges, terms and conditions as contained in the Surviving Agreement prior to the election of the Customer and Affiliate. The effective date of the Surviving Agreement shall be thirty (30) days from the date of the written notice to McLeodUSA unless the parties agree to an earlier effective date and the Surviving Agreement shall renew, expire or terminate in accordance with its original terms.

12. **Dispute Resolution.** A Dispute shall be resolved in accordance with the following procedure:

- (a) A Dispute shall be referred jointly to the responsible area Vice Presidents for McLeodUSA and the Customer. In the event that one of the individuals specified above is unavailable, the Dispute shall be referred to that individual's immediate superior or designee.
- (b) If such persons do not agree upon a decision within five (5) business days after referral of the Dispute to them, the Dispute will be escalated to the Presidents or equivalents for McLeodUSA and the Customer.
- (c) In the event that the Dispute is not resolved in five (5) additional business days as set forth in (a) and (b), above, the Parties reserve their rights at the end of such process to seek such other relief as the Party deems appropriate.

13. **Termination for Cause.** Either Party may terminate this Agreement, or any specific Service provided hereunder, for cause, provided written notice specifying the cause for termination and requesting correction within thirty (30) days (correction within ten (10) days if cause is non-payment) is given to the other Party and such cause is not corrected within such thirty (30) day (or, in the case of non-payment, ten (10) day) period. Cause is any material breach of any term of this Agreement, provided that in no event shall McLeodUSA be liable for the acts, omission or delays caused by third party vendors to McLeodUSA (specifically including incumbent carriers) as long as McLeodUSA has made commercially reasonable efforts to obtain necessary services on a timely basis. Cause shall include but not be limited to failure of Customer to pay charges when due, improper use of Services resulting in degradation or blockage of the network, fraudulent use of the Services provided, or refusal of the Customer to abide by the terms of the Agreement. Unless otherwise stated in this Agreement, if McLeodUSA terminates for cause, Customer shall pay as liquidated damages and not as a penalty, the following: (a) if such termination is prior to installation of Services, damages shall be those actual and reasonable expenses incurred by McLeodUSA through the date of termination; (b) if after activation of Services, Customer shall pay in addition to any charges for Services used, damages equaling 50% of the last three months average billing multiplied by the number of months remaining under the term of the Agreement. Actual expenses incurred by McLeodUSA to initiate or terminate the Services, any installation charges waived, and any discounts or credits granted within Exhibits to this Agreement. If Customer terminates this Agreement for cause, Customer's sole remedy, in addition to any service credits that Customer may be entitled to, shall be to terminate this Agreement. All reasonable costs and expenses, including but not limited to attorneys fees, court costs and service charges, incurred by the Party terminating for cause in accordance with this section, will be an expense of and charged to the defaulting Party. Remedies under this Agreement are exclusive and limited to those expressly stated in this Agreement.

14. **Termination for Convenience.** (a) Where a change in applicable law or regulation materially increases the cost of Services for either Party, the affected Party may: (a) elect to continue the Services without any change in the Agreement; (b) within thirty (30) days of notice of the legal or regulatory change, request renegotiation of that portion of the Agreement which caused the increase in cost; or (c) cancel the affected Service upon thirty (30) days' written notice with payment of any termination liability as provided for in this section, but with payment in full of all due recurring and nonrecurring charges and a pro rata portion of any credits, discounts or waived charges provided at the initiation of the Agreement. Customer may also terminate the Agreement, or any Service provided hereunder, at its convenience, upon thirty (30) days written notice; however, the Customer shall pay in addition to any charges for Services used, damages equaling 100% of the last three months average billing multiplied by the number of months remaining under the term of the Agreement, actual expenses incurred by McLeodUSA to initiate or terminate the Services, any installation charges waived, and any discounts or credits granted. In the event Customer intends to terminate this Agreement, or any individual Service(s) provided under this Agreement, Customer shall provide McLeodUSA with both written notice of termination



and proper disconnection documentation (eg. DFOC). McLeodUSA shall disconnect Service(s) and discontinue billing Customer for said Service(s) no later than thirty (30) days from receipt of proper disconnect documentation.

(b) Customer reserves the right to move any on-net circuit at any time after it has been installed for six months, subject to the following conditions: 1) it must be replaced by a circuit with equal or greater total monthly circuit charges (subject to availability of the replacement circuit requested); 2) payment of a per circuit, reconfiguration charge; and 3) the term of the replacement circuit must equal the remaining term of the original circuit or twelve months, whichever is greater. In the event Customer exercises such right of portability, Customer shall not be liable for any early termination liability on such ported circuits. Portability does not apply to circuits purchased by third parties on behalf of the customer. Any charges resulting from early termination of Services obtained through a third party will be passed through to the Customer. All Services purchased through a third party shall be designated as "off-net" on the applicable Service Description.

**15. Indemnity.** Each Party agrees to release, indemnify, defend and hold harmless the other Party from all losses, claims, demands, damages, expenses, suits or other actions or any liability whatsoever, including, but not limited to, costs and attorneys' fees and expenses, whether suffered, made, instituted or asserted by any other party or person, for: invasion of privacy, personal injury to or death of any person or persons, or for loss, damages to or destruction of property, whether or not owned by others, resulting from the indemnifying party's performance or failure to perform under this Agreement, regardless of the form of action; except for that portion of liability which is caused by the gross negligence or willful misconduct of the Party claiming indemnification. This indemnification is conditioned upon: (a) the indemnified Party promptly notifying the indemnifying Party of any action taken against the indemnified Party relating to the indemnification; (b) the indemnifying Party having sole authority to defend any such action, including the selection of legal counsel; (c) the indemnified Party may engage separate legal counsel only at its sole cost and expense; and (d) in no event shall the indemnifying Party settle or consent to any judgment pertaining to any such action without the prior written consent of the indemnified Party.

**16. Special Construction.** In the course of providing Services to Customer, McLeodUSA may be required to make arrangements with a third party service provider (including but not limited to the local exchange carrier) where such third party provider shall engage in special construction ("Special Construction"). In the event Special Construction is required to provide Customer with the Service(s), McLeodUSA shall notify Customer of such time and material costs. If Customer agrees to Special Construction, Customer shall provide McLeodUSA with written confirmation of its consent and agreement to pay the time and materials costs specified by McLeodUSA. Notwithstanding any earlier termination of Service, once Special Construction has commenced with Customer's consent, Customer shall be liable for all Special Construction costs incurred and invoiced by McLeodUSA. If Customer does not agree to such Special Construction, Customer shall have the right to terminate its order for the effected Service(s) with no early termination liability on the part of either party. For purposes of this Agreement, "Special Construction" may include those construction efforts undertaken by the third party service provider: (i) where facilities are not presently available, and there is no other requirement on the part of McLeodUSA for the facilities so constructed; (ii) of a type, or over a route, other than that which McLeodUSA would normally utilize in the furnishing of Services; (iii) where Services or facilities requested are in a quantity greater than that which McLeodUSA would normally construct; (iv) for Services required by Customer on an expedited basis where special construction is required; (v) on a temporary basis until permanent facilities are available; or (vi) involving abnormal costs.

**17. Equipment and Facilities.** (a) McLeodUSA Equipment. Customers shall not and shall not permit others to rearrange, disconnect, remove, attempt to repair, or otherwise tamper with any Equipment without the written consent of McLeodUSA. The Equipment is for use in connection with the Services and shall not be used for any purpose other than that for which McLeodUSA provided it. In the event that Customer or a third party tampers with or attempts to maintain the Equipment without first obtaining written approval, in addition to any other remedies for breach by Customer of Customer's obligations, Customer shall pay McLeodUSA for any damage to the Equipment and any ongoing service charges in the event that maintenance or inspection of the Equipment is required as a result of Customer's breach of this subsection. In no event shall McLeodUSA be liable to Customer or any other person for interruption of Service or for any other loss, cost or damage caused or related to tampering with the Equipment.

(b) Customer Provided Facilities. Customer has sole responsibility for installation, testing and operation of Customer-provided facilities, services and equipment. The failure of Customer-provided facilities, services and equipment will not relieve Customer of its obligation to pay for Services under this Agreement; nor is Customer relieved of its obligation to pay for Services from the Customer requested due date, if Customer is not prepared to accept Services on such date. McLeodUSA shall not be responsible for the operation or maintenance of any Customer-provided facilities, unless specifically agreed to in writing. McLeodUSA shall not be responsible for the transmission or reception of communications or signals by Customer-provided facilities or for the quality of, or defects in, such transmission or reception.

**18. General Provisions.** (a) Choice of Law/Venue. This Agreement shall be interpreted and construed in accordance with the laws of the State of Delaware without regard to choice of law principles.

Customer's Initials

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(b) **Complete Agreement/ Right to Amend.** This Agreement is the entire Agreement between McLeodUSA and Customer with respect to the Services and supersedes all prior or contemporaneous understandings or agreements, written or oral, regarding such matters. This Agreement may be amended or modified but only in writing as mutually agreed to by the Parties.

(c) **No Joint Venture.** Nothing in this Agreement shall be construed to constitute or create a joint venture, partnership or formal business organization of any kind and the rights and obligations of each Party shall be only those expressly stated in this Agreement. Neither Party shall have the authority to bind the other, and neither Party assumes any liability of the other Party.

(d) **Force Majeure.** If performance by McLeodUSA of any obligation under this Agreement is prevented, restricted or interfered with by causes beyond the reasonable control of McLeodUSA, including, but not limited to, the failure or malfunction of Customer-supplied equipment, acts of God, explosions, vandalism, cable cuts, natural disasters, power failure, national emergencies, insurrections, riots, war, strikes, lockouts, boycotts, work stoppages or other labor difficulties, delays caused by third party vendors, or any order, regulation or other actions of any governmental authority, agency instrumentality or any civil or military authority, McLeodUSA shall be excused from such performance on a day-to-day basis to the extent of such restrictions or interferences. McLeodUSA shall use reasonable commercial efforts under the circumstances to avoid or remove such causes of nonperformance with reasonable dispatch.

(e) **Severability.** If any provision of this Agreement is invalid or unenforceable under applicable law, said provision shall be ineffective to the extent of such invalidity only, without in any way affecting the remaining provisions of this Agreement and the Parties hereby agree to negotiate in good faith with respect to any such invalid or unenforceable provision to the extent necessary to render it valid and enforceable.

(f) **Confidentiality.** Customer agrees that the terms and conditions, including rates, contained in this Agreement are confidential and shall not be disclosed to any third party without the written consent of McLeodUSA; except as may be required by law. In the event the parties have entered into a separate non-disclosure agreement covering the subject matter of this Agreement, that agreement shall supersede these provisions.

(g) **Publicity.** This Agreement shall not be construed to grant either Party any right to use any of the other Party's or its affiliates' trademarks, service marks or trade names or otherwise refer to the other Party in any marketing, promotional or advertising materials or activities. Without limiting the generality of the foregoing, neither Party shall issue any publication or press release relating to, or otherwise disclose the existence of, any contractual relationship between the Parties, without the written consent of the other Party, except as may be required by law.

(h) **Survival.** Provisions contained in this Agreement that by their sense and context are intended to survive completion or performance, termination or cancellation of this Agreement, shall survive.

(i) **Notices.** All notices or other communications shall be deemed to have been given when made in writing and either: (1) delivered in person; (2) received within twenty-four (24) hours after delivery to an agent, such as an overnight or similar delivery service; all delivery services prepaid; or (3) received within 72 hours after deposited in the United States mail, postage prepaid, and addressed as follows:

**McLeodUSA**

McLeodUSA Telecommunications Services, Inc.  
ATTN: Contract Administration  
15 East Fifth Street, Suite 1800  
Tulsa, OK 74103

**Customer**

Unipoint Services, Inc.  
ATTN: \_\_\_\_\_  
6500 River Place Boulevard  
Building 2, Suite 200  
Austin, TX 78730

With copy to: McLeodUSA Telecommunications Services, Inc., Attn: Law Group, McLeodUSA Technology Park, P.O. Box 3177, Cedar Rapids, IA 52406-3177; or at such other addresses as the Parties may from time to time in writing designate. If notice is provided by overnight mail, the address is 6400-C Street SW, Cedar Rapids, Iowa 52404 Except where the context otherwise indicates, all notices and documents shall be deemed to have been given on the day received.

(j) **Non-Waiver.** The failure of either Party to enforce strict performance of any provision of this Agreement shall not be construed as a waiver of its right to assert or rely upon such provision or any other provision of this Agreement.

(k) **Duty to Confirm Registration of Other Carriers.** Before Services can be provided, and if applicable under the circumstances, Customer must provide evidence of its filing of FCC Form 499-A as required by 47 CFR 64.1195(h). Irrespective of any affirmative duty of McLeodUSA under the FCC rule, Customer's failure to file FCC Form 499-A, if required, constitutes willful misconduct and Customer agrees to indemnify and hold harmless McLeodUSA as otherwise required in this Agreement.

(l) **Limitations of Services.** This Agreement applies only to those Services provided directly to Customer and not to offerings by Customer to its customers. Unless otherwise stated in the Agreement, the Agreement does not constitute a joint undertaking with Customer to furnish any service to customers of Customer. McLeodUSA does not undertake to transmit messages, or to offer any telecommunications service to any person or entity other than Customer. McLeodUSA shall have no liability or responsibility for the content of any communications transmitted via the Service by Customer or any other party.

